# Adorna Properties Sdn Bhd v Kobchai Sosothikul

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–14 OF 1997(P)
PS GILL, RAHMAH HUSSEIN FCJJ And RICHARD MALANJUM JCA
27 AUGUST 2005

*Civil Procedure — Jurisdiction — Federal Court — Notice of motion pursuant to Rules of the Federal Court 1995 r 137 — Finality to litigation*

The applicant made a notice of motion pursuant to r 137 of the Rules of the Federal Court 1995. One of the orders sought for in this application was 'that the judgment of this honourable court pronounced on 22 December 2000 (the main judgment) be set aside and that this appeal be re-heard by this honourable court on a date to be fixed'. The main ground advanced was coram failure in that when the main judgment was delivered 'the honourable Chief Justice Eusoff Chin had retired on 19 December 2000'. At the outset of the hearing, the respondent raised a preliminary objection on the jurisdiction of the court to hear the present application. It was submitted that the order prayed for in the present application had already been dealt with in the first application. It was also contended that the order in respect of the main judgment had been perfected in that it had been sealed and extracted. In response to the preliminary objection the applicant submitted, inter alia, that there should be no issue of res judicata since for the doctrine to apply abuse must be shown. He also contended that since there was no judicial determination as such the main judgment should be set aside on the ground of nullity. It was also submitted that injustice had occasioned in that the main judgment resulted in the rightful owner losing her lands vide forged documents.

**Held**, dismissing the application:

(1) Without rendering views on the legal position of r 137 vis-a-vis the Courts of Judicature Act 1964, being the enabling statute, and whilst not endorsing any view that the earlier decisions of this court on the said Rule set the parameters on the jurisdiction of this court in respect thereof, this court was inclined to sustain the preliminary objection and that this present application should therefore be dismissed in limine (see para 10).

(2) Without going into the merits of this application, having read the reasoning in the main judgment and bearing in mind the words used in s 340(3) of the National Land Code 1965, including the proviso this court was not convinced that the interpretation given in the main judgment was patently wrong thereby resulting in grave injustice thus warranting successive application under r 137 of the Rules of the Federal Court 1995 (see paras 11–12).

(3) There was much force to be given to the contention that there should be finality to any litigation. The main judgment was handed down by this court which is the apex court of this country. If the application of r 137 is made liberally the likely consequence would be chaos to the system of judicial

hierarchy. There would then be nothing to prevent any aggrieved litigant from challenging any decision of this court on the ground of 'injustice' vide r 137. And if he succeeds in his application there is also nothing to bar the other party from making his own application to overturn such success. In short, there will be no end to the matter. This was the intention of the legislature when promulgating the said rule (see para 13).

(4) It was never suggested that the ground advanced in this application was not available then. The only reason given was 'human error'. That was not sufficient for this court to overlook the implication that to allow this application would tantamount to permitting the applicant to advance his grievances by instalment. Moreover there was a lapse of almost 18 months before the present application was filed on 12 July 2002. It would be highly undesirable and prejudicial to a successful litigant to be kept in limbo while the unsuccessful party ponders as to his next course of action (see paras 14–15).

**[Bahasa Malaysia summary**

Pemohon telah membuat satu notis usul menurut k 137 Kaedah-Kaedah Mahkamah PErsekutuan 1995. Salah satu daripada perintah yang dipohon dalam permohonan ini adalah 'that the judgment of this honourable court pronounced on 22 December 2000 (the main judgment) be set aside and that this appeal be re-heard by this honourable court on a date to be fixed'. Alasan utama yang dikemukakan adalah kegagalan coram di mana apabila penghakiman utama disampaikan 'the honourable Chief Justice Eusoff Chin had retired on 19 December 2000'. Pada mula perbicaraan, responden telah menimbulkan satu bantahan awal berhubung bidang kuasa mahkamah untuk mendengar permohonan semasa. Adalah dihujahkan bahawa perintah yang dipohon dalam permohonan semasa telahpun diselesaikan dalam permohonan pertama. Adalah juga dihujahkan bahawa perintah berkaitan penghakiman utama telahpun diperbaiki di mana ia telah dimeteraikan dan dikeluarkan. Sebagai menjawab bantahan awal pemohon berhujah, antara lain, bahawa tidak terdapat apa-apa persoalan res judicata kerana untuk menggunakan doktrin tersebut penyalahgunaan hendaklah dibuktikan. Beliau juga menegaskan bahawa tiada penentuan kehakiman dan oleh itu penghakiman utama hendaklah diketepikan atas alasan pembatalan. Adalah juga dihujahkan bahawa ketidakadilan telah berlaku di mana penghakiman utama tersebut telah mengakibatkan pemilik sebenar telah kehilangan tanahnya oleh sebab dokumen-dokumen palsu.

**Diputuskan**, menolak permohonan tersebut:

(1) Tanpa memberikan pandangan berhubung kedudukan perundangan k 137 Akta Mahkamah Kehakiman 1964, yang merupakan statut yang digunakan, dan tanpa mengindorskan apa-apa pandangan bahawa keputusan terdahulu mahkamah ini berhubung Kaedah tersebut telah menetapkan parameter berhubung bidang kuasa berkaitan dengannya, mahkamah ini akan mengekalkan bantahan awal tersebut dan permohonan semasa ini hendaklah ditolak (lihat perenggan 10).

(2) Tanpa merujuk kepada merit permohonan ini, setelah membaca alasan dalam penghakiman utama dan mengambilkira perkataan-perkataan yang digunakan dalam s 304(3) Kanun Tanah negara 1965, termasuklah proviso mahkamah ini tidak percaya yang penafsiran yang diberikan dalam penghakiman utama adalah salah sehingga mengakibatkan ketidakadilan dan mewarankan permohonan yang berjaya di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 (lihat perenggan 11–12).

(3) Penekanan diberikan terhadap hujah bahawa perlu terdapat penyelesaian kepada apa-apa litigasi. Penghakiman utama telah disampaikan oleh mahkamah ini yang merupakan mahkamah tertinggi negara ini. Jika permohonan k 137 dibuat secara liberal tentu akibatnya adalah kelam kabut terhadap sistem hiraeki kehakiman. Tiada apa-apa untuk menghalang mana-aman litigan yang terkilan daripada mencabar apa-apa keputusan mahkamah ini atas alasan 'injustice' menurut k 137. Dan jika beliau berjaya dalam permohonannya tiada apa-a yang menghalang pihak lain daripada membuat permohonannya sendiri untuk menghalang kejayaan sedemikian. Pendek kata, tidak akhirnya perkara ini. Ini adalah hasrat perundangan tatkala menggubal kaedah tersebut (lihat perenggan 13).

(4) Ia tidak dicadangkan bahawa alasan yang dikemukakan dalam permohonan ini tiada pada masa itu. Satu-satu sebab yang diberikan adalah 'human error'. Ia tidak mencukupi untuk mahkamah ini tidak mengendahkan permohonan ini di mana untuk membenarkan permohonan ini adalah sama seperti membenarkan pemohon mengemukakan kesusahannya secara ansuran. Bahkan terdapat jangkamasa 18 bulan sebelum permohonan semasa difailkan pada 12 Julai 2002. Adalah suatu yang tidak diingini dan prejudis kepada seorang litigan yang berjaya untuk dibiarkan tanpa jawapan sementara pihak yang tidak berjaya memikirkan tindakan seterusnya (lihat perenggan 14–15).]

**Notes**

For cases on the jurisdiction of the Federal Court, see 2(2) *Mallal's Digest* (4th Edm 2004 Reissue) paras 566–569.

**Cases referred to**

*Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sim Yok Eng* [2001] 1 MLJ 241 (refd)

*Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 (refd)

*Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 (refd)

*Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 (refd)

*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 (refd)

*Megat Najmuddin Bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 (refd)

*Tai Chai Yu v The Chief Registrar of The Federal Court* [1998] 2 MLJ 474 (refd)

**Legislation referred to**

Courts of Judicature Act 1964
National Land Code 1965 s 340(3)
Rules of the Federal Court 1995 r 137

*Bastian Pius Vandargon (PK Nathan & Bernard Kok) for the applicant.*
*Ghazi Ishak (Ong Kheng Leong) for the respondent.*
*Low Beng Choo watching Brief for Bar Council.*

**PS Gill FCJ (delivering judgment of the court):**

**[1]** Before us is an application by way of notice of motion made pursuant to r 137 of the Federal Court Rules 1995. The applicant, Kobchai Sosothikul, is the substituted party for his late mother, Boonsom Boonyanit @ Sun Yok Eng the former registered owner of parcels of land known as Lots 3606 & 3607 Mukim 18, Tanjung Bungah, Penang ('the said lands'). One of the orders sought for in this application is 'that the judgment of this honourable court pronounced on 22 December 2000 be set aside and that this appeal be re-heard by this honourable court on a date to be fixed'.

**[2]** On 22 December 2000, this court delivered its judgment ('the main judgment') in an appeal by the respondent in this application whereby it was held, inter alia, that in view of the proviso in sub-s (3) of s 340 of the National Land Code 1965 any purchaser of land in good faith and for valuable consideration is excluded from the application of the substantive provision of sub-s (3) thereof. Thus, he obtains an immediate indefeasible title even if the instrument of transfer is forged. Accordingly this court held that 'on the facts of this case', the appellant ('the respondent herein') obtained an indefeasible title to the said lands.

**[3]** Now, the facts of this case upon which the present application arises have been well rehearsed in the main judgment as well in the judgment of the Court of Appeal. (see *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sim Yok Eng* [2001] 1 MLJ 241 and *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62).

**[4]** And it is not in dispute that the present applicant being dissatisfied with the main judgment filed an application by way of notice of motion on 16 February 2001 ('the first application') ('encl 30') pursuant to the same r 137 of the Federal Court Rules 1995 seeking for orders, inter alia, 'that the judgment of this honourable court pronounced on 22 December 2000 be set aside and that this appeal be reheard by this honourable court on a date to be fixed' (prayer 3). The main ground advanced was coram failure in that when the main judgment was delivered 'the honourable Chief Justice Eusoff Chin had retired on 19 December 2000'.

**[5]** On 26 February 2001, this court comprising of Steve Shim CJ (Sabah & Sarawak) together with Haidar FCJ (as he then was) and the late Mokhtar Abdullah FCJ heard the first application and having listened to the submissions of all the parties, proceeded to dismiss it with costs.

**[6]** At the outset of the hearing before us, learned counsel for the respondent raised a preliminary objection on the jurisdiction of this court to hear this present application. It was submitted that the order prayed for in the present application had

already been dealt with in the first application. It was also contended that the order in respect of the main judgment had been perfected in that it had been sealed and extracted. He urged this court to dismiss this present application notwithstanding the ground relied upon, namely, 'in the interest of justice and to prevent injustice'. Learned counsel said that there should be finality to any litigation. It was also submitted that no party should be permitted to ventilate his grievances by way of instalment as was done by the applicant in this present application. And in answer to our query learned counsel conceded that under r 137 successive applications are permissible provided grave injustice could be shown.

**[7]** In response to the preliminary objection learned counsel for the Applicant submitted, inter alia, that there should be no issue of res judicata since for the doctrine to apply abuse must be shown. He also contended that since there was no judicial determination as such the main judgment should be set aside on the ground of nullity. It was also submitted that injustice had occasioned in that the main judgment resulted in the rightful owner losing her lands vide forged documents. A distinction was also drawn between the first and the present application in that the latter relies on the residuary jurisdiction or inherent jurisdiction of this court to set aside the main judgment in the interest of justice and to prevent injustice.

**[8]** We took time to consider the preliminary issue raised in view of the implication that may arise from our decision. We deferred hearing the merits of this application since our decision on the preliminary objection could have a determining effect on the matter as a whole. And in the course of our deliberation we read and re-read r 137 and its application as pronounced by this court in several cases (see *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166; *Tai Chai Yu v The Chief Registrar of The Federal Court* [1998] 2 MLJ 474; *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 and *Megat Najmuddin Bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385).

**[9]** For convenience, r 137 reads:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

**[10]** Without rendering our view on the legal position of r 137 vis-a-vis the Courts of Judicature Act 1964, being the enabling statute, and whilst not endorsing any view that the earlier decisions of this court on the said Rule set the parameters on the jurisdiction of this court in respect thereof, we are inclined to sustain the preliminary objection and that this present application should therefore be dismissed in limine.

**[11]** Our reasons may be shortly stated. Firstly, although the consequence and effect of the main judgment may be harsh when viewed without the benefit of the relevant statutory provision, we do not think this is a case where 'grave injustice had occasioned' due to clear infringement of any principle of law thereby making it

permissible for successive application to be made under the said rule. Without going into the merits of this application we find that the substance of the main judgment revolves in the interpretation of s 340 subsection (3) including the proviso thereof of the National Land Code 1965. That provision reads:

> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):
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> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
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> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
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> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

**[12]** And having read the reasoning therein and bearing in mind the words used in the said subsection including the proviso we are not convinced that the interpretation given in the main judgment is patently wrong thereby resulting in grave injustice thus warranting successive application under r 137. And even if we are wrong our view it should be left to another occasion to further debate on the issue. For now we are of the opinion that despite the concession made by learned counsel for the respondent on the issue of successive application this is not a proper case for us to proceed to hear the merits or to grant the order as sought for.

**[13]** Secondly, there is much force to be given to the contention that there should be finality to any litigation. The main judgment was handed down by this Court which is the apex court of this country. If the application of r 137 is made liberally the likely consequence would be chaos to our system of judicial hierarchy. There would then be nothing to prevent any aggrieved litigant from challenging any decision of this court on the ground of 'injustice' vide r 137. And if he succeeds in his application there is also nothing to bar the other party from making his own application to overturn such success. In short, there will be no end to the matter. We do not think that was the intention of the legislature when promulgating the said rule.

**[14]** Thirdly, this present application is weakened by the fact that there was the first application heard and dismissed by this court. And it was never suggested that the ground advanced in this application was not available then. The only reason given before us was 'human error'. We do not think that is sufficient for us to overlook the implication that to allow this application would tantamount to permitting the applicant to advance his grievances by instalment.

**[15]** Fourthly, there is also the element of delay on the part of the applicant. The first application was made in 2001 and after its disposal there was a lapse of almost 18 months before the present application was filed on 12 July 2002. Thus not only the grounds were submitted by way of instalment, there was delay as well. We do not think this court should condone, let alone encourage, such an attitude, A court of law is duty-bound to ensure that the interests of all parties appearing before it are equally

safeguarded. Public interest expects it. And it would be highly undesirable and prejudicial to a successful litigant to be kept in limbo while the unsuccessful party ponders as to his next course of action.

**[16]** This present application is therefore dismissed with costs. Preliminary objection sustained.

*Application dismissed.*

Reported by Sally Kee